

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN DUANE CHIARA,)	
)	
Plaintiff(s),)	No. C 12-6142 CRB (PR)
)	
v.)	ORDER OF SERVICE
)	
M. GRATZ, Sgt., et al.,)	
)	
Defendant(s).)	

Plaintiff, a prisoner at the Humboldt County Jail, has filed a pro se complaint under 42 U.S.C. § 1983 alleging that on October 23, 2012 mail room staff improperly denied him a magazine on the grounds that it was pornographic. Plaintiff further alleges that Sgt. M. Gratz and Lt. M. Luna improperly denied his administrative appeal on the matter, as well as his request for the name of the mail room staff person who first denied him the magazine.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be

1 granted," or "seeks monetary relief from a defendant who is immune from such
2 relief." Id. § 1915A(b). Pro se pleadings must be liberally construed, however.
3 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
5 essential elements: (1) that a right secured by the Constitution or laws of the
6 United States was violated, and (2) that the alleged violation was committed by a
7 person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48
8 (1988).

9 B. Legal Claims

10 It is well established that prisoners retain those First Amendment rights
11 not inconsistent with their status as prison inmates or with legitimate penological
12 objectives of the corrections system. See Pell v. Procunier, 417 U.S. 817, 822
13 (1974). Regulations limiting prisoners' access to publications or other
14 information are valid only if they are reasonably related to legitimate penological
15 interests. See Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (citing Turner v.
16 Safley, 482 U.S. 78, 89 (1987)).

17 Liberally construed, plaintiff's allegations that jail officials improperly
18 denied him access to a magazine on the grounds that it was pornographic appear
19 to state a cognizable First Amendment claim under § 1983 and will be served on
20 Sgt. M. Gratz and Lt. M. Luna. See id. But plaintiff's allegations that Gratz and
21 Luna declined to give plaintiff the name of the mail room staff person who first
22 denied him the magazine do not state an additional claim for relief under § 1983.
23 Plaintiff can obtain the staff person's name via discovery and add him/her as a
24 defendant in this case at a later point. This action will be limited to plaintiff's
25 First Amendment claim that jail officials improperly denied him access to a
26 magazine on the grounds that it was pornographic. But cf. Bahrampour v.

1 Lampert, 356 F.3d 969, 976 (9th Cir. 2004) (finding that Turner factors weigh
 2 towards finding Oregon's ban on sexually explicit and roleplaying materials to
 3 prisoners constitutional on its face and as applied).

4 **CONCLUSION**

5 For the foregoing reasons and for good cause shown,

6 1. The clerk shall issue summons and the United States Marshal shall
 7 serve, without prepayment of fees, copies of the complaint in this matter, all
 8 attachments thereto, and copies of this order on the following defendants at the
 9 Humboldt County Jail: Sgt. M. Gratz and Lt. M. Luna. The clerk also shall serve
 10 a copy of this order on plaintiff.

11 2. In order to expedite the resolution of this case, the court orders as
 12 follows:

13 a. No later than 90 days from the date of this order, defendants
 14 shall serve and file a motion for summary judgment or other dispositive motion.
 15 A motion for summary judgment must be supported by adequate factual
 16 documentation and must conform in all respects to Federal Rule of Civil
 17 Procedure 56, and must include as exhibits all records and incident reports
 18 stemming from the events at issue. A motion for summary judgment also must
 19 be accompanied by a Rand notice so that plaintiff will have fair, timely and
 20 adequate notice of what is required of him in order to oppose the motion. Woods
 21 v. Carey, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out in Rand
 22 v. Rowland, 154 F.3d 952 (9th Cir. 1998), must be served concurrently with
 23 motion for summary judgment). A motion to dismiss for failure to exhaust
 24 available administrative remedies must be accompanied by a similar notice.
 25 Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012); Woods, 684 F.3d at 935
 26 (notice requirement set out in Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003),
 27
 28

1 must be served concurrently with motion to dismiss for failure to exhaust
2 available administrative remedies).

3 If defendants are of the opinion that this case cannot be resolved by
4 summary judgment or other dispositive motion, they shall so inform the court
5 prior to the date their motion is due. All papers filed with the court shall be
6 served promptly on plaintiff.

7 b. Plaintiff must serve and file an opposition or statement of
8 non-opposition to the dispositive motion not more than 28 days after the motion
9 is served and filed.

10 c. Plaintiff is advised that a motion for summary judgment
11 under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your
12 case. Rule 56 tells you what you must do in order to oppose a motion for
13 summary judgment. Generally, summary judgment must be granted when there
14 is no genuine issue of material fact – that is, if there is no real dispute about any
15 fact that would affect the result of your case, the party who asked for summary
16 judgment is entitled to judgment as a matter of law, which will end your case.
17 When a party you are suing makes a motion for summary judgment that is
18 properly supported by declarations (or other sworn testimony), you cannot simply
19 rely on what your complaint says. Instead, you must set out specific facts in
20 declarations, depositions, answers to interrogatories, or authenticated documents,
21 as provided in Rule 56(e), that contradicts the facts shown in the defendant's
22 declarations and documents and show that there is a genuine issue of material
23 fact for trial. If you do not submit your own evidence in opposition, summary
24 judgment, if appropriate, may be entered against you. If summary judgment is
25 granted, your case will be dismissed and there will be no trial. Rand v. Rowland,
26 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc) (App. A).

1 Plaintiff also is advised that a motion to dismiss for failure to exhaust
2 available administrative remedies under 42 U.S.C. § 1997e(a) will, if granted,
3 end your case, albeit without prejudice. You must "develop a record" and present
4 it in your opposition in order to dispute any "factual record" presented by the
5 defendants in their motion to dismiss. Wyatt v. Terhune, 315 F.3d 1108, 1120
6 n.14 (9th Cir. 2003). You have the right to present any evidence to show that you
7 did exhaust your available administrative remedies before coming to federal
8 court. Such evidence may include: (1) declarations, which are statements signed
9 under penalty of perjury by you or others who have personal knowledge of
10 relevant matters; (2) authenticated documents – documents accompanied by a
11 declaration showing where they came from and why they are authentic, or other
12 sworn papers such as answers to interrogatories or depositions; (3) statements in
13 your complaint insofar as they were made under penalty of perjury and they show
14 that you have personal knowledge of the matters state therein. In considering a
15 motion to dismiss for failure to exhaust, the court can decide disputed issues of
16 fact with regard to this portion of the case. Stratton, 697 F.3d at 1008-09.

17 (The Rand and Wyatt/Stratton notices above do not excuse defendants'
18 obligation to serve said notices again concurrently with motions to dismiss for
19 failure to exhaust available administrative remedies and motions for summary
20 judgment. Woods, 684 F.3d at 935.)

21 d. Defendants must serve and file a reply to an opposition not
22 more than 14 days after the opposition is served and filed.

23 e. The motion shall be deemed submitted as of the date the
24 reply is due. No hearing will be held on the motion unless the court so orders at a
25 later date.

26 /

1 3. Discovery may be taken in accordance with the Federal Rules of
2 Civil Procedure. No further court order under Federal Rule of Civil Procedure
3 30(a)(2) or Local Rule 16 is required before the parties may conduct discovery.

4 4. All communications by plaintiff with the court must be served on
5 defendants, or defendants' counsel once counsel has been designated, by mailing
6 a true copy of the document to defendants or defendants' counsel.

7 5. It is plaintiff's responsibility to prosecute this case. Plaintiff must
8 keep the court and all parties informed of any change of address and must comply
9 with the court's orders in a timely fashion. Failure to do so may result in the
10 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

11 SO ORDERED.

12 DATED: April 17, 2013



CHARLES R. BREYER
United States District Judge